SUPREME COURT U.S.
FILED
FEB 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-786

LLOYD A. FRY ROOFING COMPANY, a corporation,
Petitioner,

vs.

ILLINOIS POLLUTION CONTROL BOARD, ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, THE COUNTY OF COOK, a body politic, VILLAGE OF SUMMIT, REV. LOUIS HEMMERICH et al.,
Respondents.

REPLY TO PETITION FOR WRIT OF CERTIORARI

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ADDITIONAL STATUTES INVOLVED

Ill. Rev. Stat., ch. 111½, § 1033(c), in pertinent part:

> In making its orders and determinations, the Board shall take into consideration all the facts and circumstances bearing upon the reasonableness of the emissions, discharges, or deposits involved including, but not limited to:
>
> 1 the character and degree of injury to, or interference with the protection of the health, general welfare and physical property of the people;
>
> 2 the social and economic value of the pollution source;
>
> 3 the suitability or unsuitability of the pollution source to the area in which it is located, including the question of priority of location in the area involved; and
>
> 4 the technical practicability and economic reasonableness of reducing or eliminating the emissions, discharges or deposits resulting from such pollution source.

ADDITIONAL STATEMENT OF THE CASE

The Complaint filed by the Illinois Environmental Protection Agency before the Illinois Pollution Control Board alleged, in part, that Fry Roofing Company violated the prohibition against air pollution contained in Section 9(a) of the Illinois Environmental Protection Act. In its Opinion and Order, the Board stated that it is necessary, when reviewing the record before it, to determine "whether Fry's operation *substantially* interfered with the enjoyment of life and property in the community". The Board then discussed the evidence contained in the record and found that Fry's operation "caused a severe burden and nuisance on the community".

The Illinois Appellate Court specifically addressed itself to the issue of whether the Board applied the proper statutory standard when reviewing the evidence in the record. The Appellate Court noted that one definition of air pollution, contained in Section 3(b) of the Act, refers to causing an *unreasonable interference with the enjoyment of life or property.* Following a discussion of applicable case law and of the evidence in the record, the Appellate Court construed the Opinion and Order of the Pollution Control Board as properly finding that Fry had caused an unreasonable interference with the enjoyment of life and property, and, therefore, that Fry violated the prohibition against air pollution contained in Section 9(a) of the Act.

ARGUMENT

I.

THE PROHIBITION AGAINST AIR POLLUTION, CONTAINED IN SECTION 9(a) OF THE ILLINOIS ENVIRONMENTAL PROTECTION ACT, IS DEFINITE AND CERTAIN SO AS TO ENABLE CITIZENS TO UNDERSTAND WHAT CONDUCT IS PROSCRIBED.

The Illinois Appellate Court affirmed that portion of the Illinois Pollution Control Board's decision finding that Fry caused air pollution in violation of Section 9(a) of the Act. Specifically, the Appellate Court interpreted the Board's decision as finding that Fry had caused an *unreasonable interference with the enjoyment of life and property,* and affirmed that decision. The above statutory definition of air pollution, as interpreted by Illinois courts, is well within this Court's requirements for a valid statute.

The Illinois Supreme Court has interpreted Section 9(a) of the Act as establishing a statutory prohibition against "air pollution", independent of the existence or violation of regulations or standards adopted by the Illinois Pollution Control Board, *City of Monmouth* v. *Pollution Control Board,* 57 Ill. 2d 482, 313 N.E. 2d 161 (1974). The Illinois Supreme Court has also interpreted the definition of air pollution contained in Section 3(b) of the Act as comprising two distinct categories of "air pollution". The first category is the presence in the atmosphere of contaminants injurious to human, plant or animal life, to health, or to property. The second category is the presence in the atmosphere of contaminants which unreasonably interfere with the enjoyment of life or property. *Incinerator, Inc.* v. *Pollution Control Board,* ——Ill. 2d——, ——N.E. 2d—— (No. 46369, November 27, 1974).

The Illinois Appellate Court and the Illinois Pollution Control Board found that Fry violated Section 9(a) of the Act by causing an unreasonable interference with the enjoyment of life and property. Fry was not found to have violated Section 9(a) of the Act by "threatening", or "allowing", or "tending to cause air pollution" or "causing air pollution in combination with contaminants from other sources". The constitutionality of these latter provisions was therefore not before the Illinois Appellate Court for decision. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610, 93 S. Ct. 2908, 2915 (1973); *Jaffe* v. *Cruttenden,* 412 Ill. 606, 613, 107 N.E. 2d 715, 720 (1952). Fry, therefore, may not claim the exercise of jurisdiction by this Court for the purpose of having the constitutionality of provisions reviewed which were not involved in the Illinois court proceedings. *Department of Mental Hygiene of California* v. *Kirchner,* 380 U.S. 194, 197, 85 S. Ct. 871, 873 (1965). Additionally, no Illinois court has yet addressed itself to the construction or constitutionality of those provisions. This Court has refused to review state statutes under such circumstances. *Asbury Hospital* v. *Cass County,* 326 U.S. 207, 215, 66 S. Ct. 61, 65 (1945).

Fry's primary objection to the air pollution prohibition is, therefore, that it prohibits the emission of contaminants which *unreasonably interfere* with the enjoyment of life or property. Fry erroneously argues that no person of common intelligence could possibly guide his conduct so as to comply with this standard. A decision by this Court reviewing similar statutory language has held that such a statute clearly and precisely delineates the required conduct in words of common understanding. In *Cameron* v. *Johnson,* 390 U.S. 611, 88 S. Ct. 1335 (1968), petitioner sought a judgment declaring the Mississippi Anti-Picketing Statute unconstitutional on vagueness grounds. That statute provided in pertinent part:

> It shall be unlawful for any person . . . to engage in picketing or mass demonstrations in such a manner as to obstruct or *unreasonably interfere* with free ingress or egress to and from any public premises. . . . [emphasis added]

Against the same challenge that Fry makes here, this Court upheld the statutory provision, stating, at 390 U.S. 616, that

> . . . the statute prohibits only "picketing" . . . in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses . . . .The terms "obstruct" and unreasonably interfere" plainly require no "guess(ing) at (their) meaning. Appellants focus on the word "unreasonably". [footnote omitted] It is a widely used and well understood word and clearly so when juxtaposed with "obstruct" and "interfere". We conclude that the statute clearly and precisely delineates its reach in words of common understanding. [footnote omitted]

The statute in *Cameron* involved no guidelines or standards other than those provided by the common understanding of the phrase "*unreasonably interfere*" when taken in its statutory context. While these guidelines, by themselves, are sufficiently precise, the Illinois Supreme Court has interpreted the Illinois Environmental Protection Act as containing additional statutory guidelines and standards. The Illinois Supreme Court held that the unreasonableness of the interference with the enjoyment of life or property is to be determined with reference to those specific factors enumerated in Section 33(c) of the Act. *Incinerator, Inc.* v. *Pollution Control Board,* —Ill. 2d—, ——N.E. 2d —— (No. 46369, November 27, 1974); *City of Monmouth* v. *Pollution Control Board,* 57 Ill. 2d 482, 313

N.E. 2d 161 (1974); *City of Waukegan* v. *Pollution Control* Board, 57 Ill. 2d 170, 311 N.E. 2d 146 (1974). Such a statutory construction eliminates any question of constitutional infirmity.

II.

PROCEEDINGS BEFORE THE ILLINOIS POLLUTION CONTROL BOARD ARE CIVIL IN NATURE.

Section 42 of the Illinois Environmental Protection Act specifies sanctions which the Illinois Pollution Control Board may impose for violations of the Act. Fry contends that the sanctions authorized by Section 42 are criminal in nature. Because the State of Illinois may bring criminal actions for violations of the Act in Illinois trial courts, Fry contends that the State is permitted by the Act to arbitrarily choose to initiate criminal proceedings either before the Pollution Control Board or in the State courts. Therefore, Fry argues, a respondent before the Illinois Pollution Control Board is unconstitutionally denied the procedural guarantees to which a defendant in a criminal action is entitled. Decisions by the Illinois Supreme Court interpreting the Illinois Environmental Protection Act invalidate such assumptions and foreclose Fry's contention that the Act is unconstitutional.

Both civil and criminal sanctions may be imposed in respect to the same act or omission. It is only when the sanction sought to be imposed is criminal in nature that the constitutionally required procedures governing criminal prosecutions must be afforded parties to the proceeding. *Helvering* v. *Mitchell*, 303 U.S. 630, 58 S. Ct. 644 (1938). Whether a particular statutory sanction is civil or criminal in nature is a question of statutory construction.

Helvering v. *Mitchell*, 303 U.S. 630, 58 S. Ct. 644 (1938). In cases challenging the constitutionality of the Environmental Protection Act, the Illinois Supreme Court has been required to construe the nature of the sanctions authorized by Section 42 of the Act and has held that such sanctions are civil. *City of Monmouth* v. *Pollution Control Board*, 57 Ill. 2d 482, 313 N.E. 2d 161 (1974); *City of Waukegan* v. *Pollution Control Board*, 57 Ill. 2d 170, 311 N.E. 2d 146 (1974). Fry's constitutional challenge, based upon the contention that proceedings before the Pollution Control Board are criminal in nature, is therefore without merit.

III.

THE ILLINOIS ENVIRONMENTAL PROTECTION ACT AND THE POLLUTION CONTROL BOARD'S REGULATIONS CONCERNING THE SUBMISSION OF WRITTEN OR ORAL ARGUMENTS ARE IN ACCORD WITH THIS COURT'S STANDARDS FOR A FAIR HEARING.

Fry lastly argues that, by permitting the Pollution Control Board to enter its Decision and Order prior to the submission of written briefs by the parties, the Environmental Protection Act and the Pollution Control Board's regulations violate due process. The Illinois Appellate Court interpreted the Environmental Protection Act as not requiring the Pollution Control Board to await the filing of written briefs by the parties prior to its rendering a decision. The Appellate Court also held that, based upon the facts before it, the Board did not abuse its discretion by rendering its decision without considering briefs from the parties. Fry asks this Court to review the con-

stitutionality of the Environmental Protection Act *as interpreted by the Illinois Appellate Court. Gooding* v. *Wilson,* 405 U.S. 518, 92 S. Ct. 1103 (1972).

The Act requires that the Pollution Control Board, when making its orders and decisions, consider the written and oral statements submitted at the hearing [Sections 33(a) and 32] and the testimony and arguments submitted at the hearing [Section 33(a)]. Fry has not contended that the Board in any way violated these requirements. In *Morgan* v. *United States,* 298 U.S. 468, 56 S. Ct. 906 (1936), this Court specified the requirements for a full and fair hearing. In discussing the issuance of an order by a tribunal or person who had not considered the evidence or the argument of the parties, this Court stated, at 56 S. Ct. 912, that:

> . . . there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, *the officer who makes the determinations must consider and appraise the evidence which justifies them.* [emphasis supplied]

Morgan has been interpreted to require "that the officer who makes the findings must have considered evidence or argument". *Estate of Varian* v. *Commissioner of Internal Revenue,* 396 F. 2d 753, 755 (9th Cir. 1968), *cert. den.* 393 U.S. 962, 89 S. Ct. 402. The so-called "second" *Morgan* case [*Morgan* v. *United States,* 304 U.S. 1, 58 S. Ct. 773 (1938)] simply does not contain the holdings enumerated by Fry in its argument. (Pet. brief, pp. 15-16).

The requirement placed upon the Pollution Control Board by the Illinois General Assembly to consider and appraise the evidence when making its determinations is fully in accord with this Court's prior case law.

CONCLUSION

Respondents respectfully pray that Fry Roofing Company's Petition For Writ of Certiorari be denied.

Respectfully submitted,

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